MOHAMED IDRIS TULIS, RE: EX P; BANK BUMIPUTRA (M) BHD.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[COMMERCIAL DIVISION NO. C4-43-5196-86]
4 FEBRUARY 1989

BANKRUPTCY: *Application for stay of further proceedings - Application to rescind and annual receiving/adjudicating orders - Whether application to set aside O. 14 judgment constitutes sufficient reason to order stay of proceedings - Whether orders made in open Court or chambers - Non compliance with r. 55 Bankruptcy Rules.*

This was an application by the bankrupt for stay of further proceedings after receiving/adjudicating orders were made against him, and also an application to rescind and annul the receiving/adjudicating orders. He contended that as he would be applying to set aside the O. 14 judgment made against him for irregularity and accordingly the bankruptcy proceedings should be stayed. The application to rescind and annul was based on the following grounds:

(a) That he was able to meet his debt and exhibited a letter from his solicitors addressed to him which made reference to a third party's offer to remit a certain sum to settle the bankrupt's debts;

(b) That the receiving/adjudicating orders were made in chambers and were a nullity;

(c) That the receiving/adjudicating orders were founded on a irregular O. 14 judgment and were a nullity.

The notes of the Judge who made the receiving/adjudicating orders showed that the proceedings were conducted in open Court. The Court was also informed that notice of application to rescind/annual was not served on the official assignee pursuant to r. 155 Bankruptcy Rules.

Held:
(Dismissing both applications)
[1] An application to set aside an O. 14 judgment on the ground of irregularity is not a sufficient reason for stay of bankruptcy proceedings whilst the receiving and adjudicating orders remain in force.

[2] The summary judgment against the bankrupt cannot be contested whilst the receiving/adjudicating orders remain in force.

[3] The Judge's notes showed that proceedings were conducted in open Court and the receiving/adjudicating order made therein were not a nullity.

[4] The letter from the bankrupt's solicitors was not sufficient proof of his ability to meet his debts.

[5] The exercise of discretion by the Judge who made the receiving and adjudicating orders after being satisfied that the judgment debtor was not able to meet his debts cannot be examined by present application.

[6] The present application was irregular for non compliance with s. 155 Bankruptcy Rules.

Case referred to:
Boaler v. Power & Ors. [1910] 2 KB 229

Legislation referred to:
Bankruptcy Act 1967, s. 24(1),
Bankruptcy Rules 1969, r. 155

For the appellant - Paul Ong
For the respondent - Shamsul Bahrin
For the official assignee - Raj

JUDGMENT

Zakaria Yatim J:

There are two applications filed by the bankrupt before this Court. The first application is to seek the order of this Court that all further proceedings in this suit be stayed. The second application is to rescind and annul the receiving and adjudication orders made by the Court on 28 September 1987.

I shall deal with the first application first. In his affidavit in support of the application, the applicant referred to civil suit no. 1791 of 1983 in which the applicant was suing Bank Bumiputra for RM5,000,000. He averred that he had a "valid and over topping cross demand... against the judgment creditor which will render the bankruptcy notice void... and in any event justify a stay of proceedings herein until the final disposal" of his suit 1791 of 1983. Mr. Paul Ong, Counsel for the applicant, however submitted in Court on a different ground. He told the Court that he was applying for a stay of proceedings until the O. 14 judgment made against his client was set aside on the ground of irregularity.

In my opinion, once receiving and adjudication orders have been made against the judgment debtor and if the said orders remain in force the applicant cannot contest the summary judgment on the ground of irregularity. In the present case the receiving and adjudication orders still remain in force and the orders are conclusively binding on him. See *Boaler v. Power & Ors*. [1910] 2 KB 229.

Having heard the submissions of Counsel for the applicant and Counsel for the judgment creditor, I find no sufficient reason to order a stay of proceedings. In the circumstances the application for stay is dismissed.

I now turn to the application to rescind and annul the receiving and adjudication orders dated 28 September 1987. This application is supported by an affidavit affirmed by the bankrupt on 31 December 1987. In the affidavit he stated that "the bankruptcy petition and the receiving and adjudication orders were granted in chambers and are therefore null and void." The deponent said that the bankruptcy notice proceeded from an irregular judgment and should be set aside. He also said that he was able to meet his debts. In support of his averment that he had sufficient funds to settle the debt he exhibited a letter dated 19 December 1987 written by his solicitors to him. The letter is reproduced below:

> Encik Idris Tulis,
> c/o Paul Ong & Associates,
> 7th Floor, Bangunan Yee Seng,
> 15, Jalan Raja,
> 50200 Kuala Lumpur.
>
> Dear Sirs,
>
> **Re: Debt Sum outstanding.**

The aforesaid matter refers.

We act for YAM Tengku Ismail Shah Ibni Almarhum Sultan Hismuddin Alam Shah Al. Haj. DPMS, Tengku Besar Putra Selangor Darul Ehsan.

We are strictly instructed to inform your goodself that YAM Tengku Ismail Shah Ibni Almarhum Sultan Hisamuddin Alam Shah A1. Haj. DPMS Tengku Besar Putra Selangor Darul Ehsan is awaiting finalisation of documentation for an assignment from Perwira Habib Bank Berhad and shall cause a lump sum of RM50,000 to be remitted into the aforesaid account directly from Perwira Habib Bank Berhad (Head Office) by the middle of February 1988 in order to accommodate Encik Idris Tulis' financial commitments.

We trust your goodself will bear with YAM Tengku Ismail Shah Ibni Almarhum Sultan Hisamuddin Alam Shah A1. Haj. DPMS, Tengku Besar Putra Selangor Darul Ehsan until the time aforesaid.

Thank You.

Yours faithfully,

sgd/-

c.c. YAM Tengku Ismail Shah Ibni Almarhum Sultan Hisamuddin Alam Shah Al. Haj. DPMS, Tengku Besar Putra Selangor Darul Ehsan.

At the hearing of the application, the main point taken by Mr. Paul Ong was that the allegation that the hearing of the bankruptcy petition and the granting of the receiving and adjudication orders were made in chambers in the absence of the judgment debtor. I have examined the certified true copy of the record of proceedings before the learned Judge who heard the petition on 28 September 1987. The record says that the hearing of the petition was held in open Court in the presence of Counsel for the judgment creditor and Counsel for the judgment debtor. The record shows that there were lengthy arguments by both Counsel.

The learned Judge then adjourned the matter to the next day. On 29 September 1987 the learned Judge made receiving and adjudication orders against the judgment debtor in open Court in the presence of both Counsel for the judgment creditor and Counsel for the judgment debtor. The following endorsement is shown in the Court file:

Date: 29 September 1987. In open Court.
Book No: ... Page ... Encl: 4.
Coram: Abdul Razak J

Bkcy. 5196/86

Encik Shamsul for the petitioner.
Encik Azzat for the debtor.

Court: Application is dismissed with costs. AO & RO in encl. 6.

Sgd/-
for Senior Assistant Registrar,
High Court Malaya,
Kuala Lumpur.

In my opinion the allegation that the petition was heard in chambers and the receiving and adjudication orders were made in chambers has no basis whatsoever.

With regard to the letter exhibited to his affidavit it was only a letter from his solicitors addressed to him. It was not a letter from him or his solicitors to the judgment creditor offering a composition or scheme of arrangement. In any event, when the learned Judge made the

receiving and adjudication orders, he must be satisfied that the judgment debtor was not in a position to offer a composition or make a scheme of arrangement satisfactory to the judgment creditor pursuant to s. 24(1) of the Bankruptcy Act 1967. It is however not for this Court to examine the exercise of discretion by the learned Judge in granting the receiving and adjudication orders.

Encik Shamsul Bahrin, Counsel for the judgment creditor submitted that notice of the application and the affidavit in support had not been served on the Official Assignee. According to him the applicant failed to comply with r. 155 of the Bankruptcy Rules. Rule 155 states *inter alia*:

> An application to the Court to rescind a receiving order or to stay proceedings thereunder or to annul an adjudication, shall not be heard except upon proof that notice of the intended application, and a copy of the affidavits in support thereof, have been duly served upon the Official Assignee. Unless the Court gives leave to the contrary, notice of any such application shall be served on the Official Assignee not less than fourteen days before the day named in the notice for hearing the application. Pending the hearing of the application, the Court may make an interim order staying such of the proceedings as it thinks fit.

For the reasons I have stated above, I dismiss the application to rescind and annul the receiving and adjudicating orders dated 29 September 1987.

Also found at [1989] 2 CLJ 1053